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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. P1300CR2008-1339

Division 6

**MOTION TO STRIKE DEATH
NOTICE**

(Oral Argument and Evidentiary
Hearing Requested)

Pursuant to Rules 5, 13.5, 15, and 16 of the Arizona Rules of Criminal
Procedure, due process, and the Arizona and U.S. Constitution, Defendant Steven
DeMocker requests that this Court strike the State's Notice of Intent to Seek Death.
This Motion is supported by the following Memorandum and Points of Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Under Arizona Rule of Criminal Procedure 15.1(i)(1) the State is required to file
its notice of intent to seek the death penalty no later than 60 days after the arraignment.
This period can be extended for 60 days only upon written stipulation of the parties filed
with the court. Additional extensions may be granted only upon stipulation and court

1 approval. The notice as well as the list of aggravating circumstances the state will rely
2 on "shall" be filed at the same time. Ariz. R. Crim. P. 15.1(i)(2).

3 BACKGROUND

4 On October 27, 2008, the State filed its Notice of Intent to Seek the Death
5 Penalty against Mr. DeMocker alleging three aggravating factors; A.R.S. §13-
6 703(f)(2)¹, that the defendant has been or was previously convicted of a serious offense;
7 §13-703(f)(5)², that the defendant committed the offense for pecuniary gain, and §13-
8 703(f)(13)³, that the defendant committed the offense in a cold, calculated and cruel
9 manner. On October 31, 2008 the State obtained an Indictment charging Mr. DeMocker
10 with one count of first degree murder and one count of aggravated burglary. On
11 November 21, 2008, the State filed an amended Notice of Intent to Seek Death Penalty
12 adding an additional aggravating factor, §13-703(f)(12)⁴, that the offense was
13 committed to prevent a person's cooperation with or in retaliation for a person's
14 cooperation with an official law enforcement proceeding or testimony in court
15 proceedings. The Court granted Mr. DeMocker's Motion to remand the case to the
16 grand jury for a new finding of probable cause on January 22, 2009.

17 In that Order and in the Court's Order issued the same day denying the State's
18 request to hold Mr. DeMocker in custody without bond, the Court made important
19 findings on issues related to the alleged aggravating circumstances. For example, the
20 Court found that there was no evidence of any financial motive, as is required under
21 (f)(5). (See January 22, 2009 Order denying the State's request to hold Mr. DeMocker
22 in custody without bond, page 6.)

23 After the Court's orders, Mr. DeMocker requested that, if the State was going to
24 continue to seek the death penalty against him, it submit the aggravating factors to the
25 grand jury.

26
27 ¹ Renumbered as A.R.S. § 13-751 (f)(2) and amended by Laws 2008, Ch. 301 §§ 26, 38, eff. Jan. 1, 2009.

² Renumbered as A.R.S. § 13-751 (f)(5) and amended by Laws 2008, Ch. 301 §§ 26, 38, eff. Jan. 1, 2009.

³ Renumbered as A.R.S. § 13-751 (f)(13) and amended by Laws 2008, Ch. 301 §§ 26, 38, eff. Jan. 1, 2009.

⁴ Renumbered as A.R.S. § 13-751 (f)(12) and amended by Laws 2008, Ch. 301 §§ 26, 38, eff. Jan. 1, 2009.

1 After remand, the grand jury indicted Mr. DeMocker on February 6, 2009 on one
2 count of first degree murder and one count of aggravated burglary.⁵ Despite Mr.
3 DeMocker's request, and without explanation, no aggravating circumstances are alleged
4 in the Indictment. Mr. DeMocker was arraigned on February 10, 2009. On May 13,
5 2009, ninety-one days after arraignment and thirty-one days after expiration of the time
6 permitted under Rule 15.1(i), the State filed its Notice of Intent to Seek Death Penalty
7 against Mr. DeMocker and alleged four aggravating circumstances: A.R.S. §13-
8 703(f)(2)⁶, that the defendant has been or was previously convicted of a serious offense;
9 §13-703(f)(5)⁷, that the defendant committed the offense for pecuniary gain, §13-
10 703(f)(13)⁸, that the defendant committed the offense in a cold, calculated and cruel
11 manner and §13-703(f)(12)⁹, that the offense was committed to prevent a person's
12 cooperation with or in retaliation for a person's cooperation with an official law
13 enforcement proceeding or testimony in court proceedings. On June 29, 2009, 128 days
14 after arraignment and seventy-seven days past the time permitted under Rule 15.1(i), the
15 State amended its Notice of Intent to Seek Death Penalty to add an additional
16 aggravating circumstance.

17 The State did not seek and Mr. DeMocker did not stipulate to any extension of
18 the time permitted under Rule 15.1(i).

19 ARGUMENT

20 I. The Death Notice Should Be Dismissed

21 An aggravating circumstance transforms a charge of first degree murder into the
22 separate charge of capital murder. Therefore, whether properly considered an element
23 or the "functional equivalent" of an element, Mr. DeMocker's Sixth Amendment right
24 to trial by jury is impacted by the allegation of an aggravating circumstance. *See e.g.*
25

26 ⁵ Count I of the supervening Indictment which alleges first degree murder, refers to A.R.S. 13-604.01, crimes
against children. Counsel assumes this is in error, but requests immediate notification if it is not.

27 ⁶ Renumbered as A.R.S. § 13-751 (f)(2) and amended by Laws 2008, Ch. 301 §§ 26, 38, eff. Jan. 1, 2009.

27 ⁷ Renumbered as A.R.S. § 13-751 (f)(5) and amended by Laws 2008, Ch. 301 §§ 26, 38, eff. Jan. 1, 2009.

28 ⁸ Renumbered as A.R.S. § 13-751 (f)(13) and amended by Laws 2008, Ch. 301 §§ 26, 38, eff. Jan. 1, 2009.

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1 *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348. A criminal defendant is entitled
2 to “a jury determination that [he] is guilty of every element of the crime with which he
3 is charged, beyond a reasonable doubt,” and that “other than the fact of a prior
4 conviction, any fact that increases the penalty for a crime beyond the prescribed
5 statutory maximum must be submitted to a jury, and proved beyond a reasonable
6 doubt.” *Id.* at 477 and 490. Because the ultimate penalty of death is being sought when
7 such a circumstance is alleged, Mr. DeMocker’s Eighth Amendment and Fourteenth
8 Amendment due process rights are also implicated. *See, e.g., Harris v. United States*,
9 536 U.S. 545, 122 S.Ct. 2406, (2002) (noting, by comparison, that unlike the Fifth
10 Amendment grand jury requirement which to date has been held to be inapplicable to
11 the states, the Sixth Amendment notice requirement that defendants be informed of
12 charges against them does clearly apply to the states through the Fourteenth
13 Amendment Due Process Clause).

14 Arizona Rule of Criminal Procedure 15.1(i) was amended after the Supreme
15 Court’s decision invalidating Arizona’s death penalty statute in *Ring v. Arizona*, 536
16 U.S. 584, 122 S. Ct. 2428 (2002). The Rule is specific to disclosure required in capital
17 cases and is mandatory. It provides that the prosecutor “shall” provide notice no later
18 than 60 days after the arraignment. *Id.* The prosecutor “shall at the same time” provide
19 the list of aggravating factors the state will rely on in seeking the death penalty. *Id.*
20 The Rule specifically provides the conditions for granting of an extension of time. *Id.*
21 A sixty-day extension is available “upon written stipulation of counsel.” Additional
22 extensions may be granted “upon stipulation of the parties and approval of the Court.”
23 *Id.* No provision permits an extension of time to provide a list of aggravating factors
24 beyond the date when the notice is filed.

25 In this case no such stipulation was reached, nor was any motion filed or court
26 approval sought or granted. The State completely ignored the requirements of the Rule
27 and filed its Notice ninety-one days after Mr. DeMocker was arraigned and its Amended
28 Notice 138 days after Mr. DeMocker was arraigned.

II. Dismissal of the Notice Is Appropriate

Rule 15.7 permits the Court to impose any sanction it finds appropriate where a party violates the disclosure required under Rule 15. *See* Ariz. R. Crim. P. 15.7(a). A trial court has broad discretion in fashioning a sanction and will not be found to have abused its discretion "unless no reasonable judge would have reached the same result under the circumstances." *See State v. Armstrong*, 208 Ariz. 345, 354, 93 P.3d 1061, 1070 (2004) (citing *State v. Chapple*, 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 1224 n. 18 (1983)). In imposing sanctions the court is to consider the significance of the information not timely disclosed. Ariz. R. Crim P. 15.7(a).

In a death penalty case, whether the State is seeking death and its grounds for doing so are unquestionably the most significant information in the case. A death notice effects what crime is actually charged, the nature and quality of constitutionally required resources, and the penalty sought. There is no part of any criminal case that is not affected by a death notice and alleged aggravating circumstances. In a capital case exacting standards must be met to assure that it is fair. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). As a result, the United States Constitution requires that "extraordinary measures [be taken] to insure that the [Accused] is afforded process that will guarantee, as much as is humanly possible, that [a sentence of death not be] imposed out of whim, passion, prejudice, or mistake." *Caldwell v. Mississippi*, 472 U.S. 320, 352 n.2 (1985) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring)). Indeed, "[t]ime and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." *Caspari v. Bolden*, 510 U.S. 383, 393 (1994) (quoting *Strickland v. Washington*, 466 U.S. 668, 704-705 (1984) (Brennan, J., concurring in part and dissenting in part)). *See also Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (noting that the Court's "duty to search for constitutional error with

1 painstaking care is never more exacting than it is in a capital case.") (*quoting Burger v.*
2 *Kemp*, 483 U.S. 776, 785 (1987)). This elevated level of due process applies both to the
3 guilt and penalty phases of the case. *Beck v. Alabama*, 447 U.S. 625, 638 (1980).

4 It is now over a year after Ms. Kennedy was killed, and almost a year since Mr.
5 DeMocker was charged. The State has failed to provide Mr. DeMocker with any
6 disclosure which supports most of its allegations as to aggravating factors. The State
7 admits as much in its response to Mr. DeMocker's request to strike the death notice or
8 for an evidentiary hearing on the probable cause of the aggravators alleged by the State.
9 The State responded late and admitted that it needs more time to show evidence of
10 pecuniary gain and "is awaiting further financial analysis" with respect to the (f)(5)
11 alleged aggravating circumstance. (State's Motion for Leave to File Delayed Response
12 to Defendant's Motion to Dismiss Death Penalty for Lack of Probable Cause, page 2.)
13 With respect to the (f)(12) aggravating circumstance the State repeats that "[t]he State is
14 awaiting further financial analysis." (State's Motion, page 4). The State's response also
15 asserts, for the first time, that "Yavapai County Medical Examiner Dr. Keen stated there
16 is evidence that Carol suffered greatly before her death." (State's Motion, page 3.) The
17 State has not disclosed any statements or interviews of Dr. Keen. Nor does this
18 information appear in any disclosure provided by the State to the Defense. The State
19 also asserts for the first time in its response that there is evidence that Carol was beaten
20 while she "was unconscious." (*Id.*) This too is not in any disclosure provided to the
21 Defense. The deadline for the State's disclosure has passed.

22 The Court is also required to consider the effect on the party and the victim if the
23 Court dismisses the death Notice as requested. *See* Ariz. R. Crim. P. 15.7(a). The
24 effect of the Court's striking of the Notice would be that the State will still be able to
25 seek a life sentence but will not be permitted to seek the ultimate sentence of death
26 where it plainly failed to follow the rules which are clearly written. The State has
27 offered no explanation for its failure to comply with these rules and has instead simply
28 acted as if the rules either do not exist or do not apply to it. Exclusion of the death

1 penalty is an appropriate sanction for failure to timely notice its intent to seek the death
2 penalty. *Barrs v. Wilkinson*, 186 Ariz. 514, 924 P.2d 1033 (1996). *Barrs* dealt with
3 penalties under the predecessor rules, Ariz. R. Crim. P. 15.1(g)(1) and (4), and rejected
4 a jurisdictional challenge on the failure to file a notice. The Supreme Court in *Barrs*
5 noted that although untimely notice does not automatically preclude the state from
6 seeking a death sentence, a continuance is not the only proper remedy and other
7 available sanctions include preclusion of the death penalty. A court need not find that
8 other less stringent sanctions are not applicable to effect the ends of justice “where the
9 only potential ‘loss’ to the criminal proceeding is a sentencing option.” *Id.* This Court
10 plainly has the power to select the appropriate remedy; striking the Notice of death.

11 Mr. DeMocker has already lost his liberty for almost a year and is preparing to
12 defend his life against evidence that the State has not disclosed to him even though the
13 Court’s disclosure deadline has long since passed and even though the allegations as to
14 aggravators were made, albeit untimely, over four months ago. The State also admits it
15 does not even have the evidence to support probable cause, let alone the required
16 standard of proof at trial, for some of the alleged aggravators. The Court has broad
17 discretion to impose appropriate sanctions. Given the State’s failure to even
18 acknowledge let alone attempt to comply with the Rules of Criminal Procedure in this
19 capital case where Mr. DeMocker’s life is at stake, and given the State’s admitted lack
20 of evidence disclosed or even available to the State to support these aggravators, this
21 Court should dismiss the State’s Notice of Intent to Seek Death.

22 CONCLUSION

23 For these reasons, Mr. DeMocker requests that this Court strike the State’s
24 Notice of Intent to Seek Death.

1 DATED this 7th day of October, 2009.

2 By:

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10 **ORIGINAL** of the foregoing mailed for filing
11 this 7th day of October, 2009, with:

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17 **COPIES** of the foregoing mailed
18 this 7th day of October, 2009, 2008 to:

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